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AND INDIANA
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AND OHIO
* ADMITTED TO BAR NEW YORK
AND CONNECTICUT ONLY
* ADMITTED TO BAR NORTH
CAROLINA ONLY

May 19, 1995

Mr. James R. MacAyeal
Trial Attorney
Environmental Enforcement Section
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, DC 20044-7611

Re: United States of America v. Ben Hardy, et al.

Dear Jamie:

I enclose a revised Consent Decree incorporating the changes we discussed. Pending further exploration of the issues, I have not included language releasing Ben B. Hardy from future liability or addressing the consequences of the Foundation being unable to make its charitable contributions pursuant to the Internal Revenue Code. For purposes of this Consent Decree, we are assuming that the United States obtains discovery of the assets of the Defendants prior to the lodging of the Consent Decree, which I believe should eliminate the need for the representations and warranties as well. You have indicated that the Commonwealth of Kentucky will sign a dismissal with prejudice of its claims, which you will assist us in obtaining. I also want to confirm that pending the settlement, the United States wants the Foundation to preserve its assets by paying taxes, mortgage payments, utility bills, and reasonable attorney's fees in connection with the pending litigation.



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Mr. James R. MacAyeal
May 19, 1995
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**BROWN TODD
& HEYBURN PLC**

Please advise me of your questions or comments.

Sincerely,



Mark R. Feather

cc: Robert Caplan

Enclosure

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THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	Civil Action Nos. 90-0695-L(J)
)	90-0792-L(J)
BEN HARDY, et al.,)	
)	
Defendants.)	

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed a Complaint in United States District Court for the Western District of Kentucky on October 18, 1990 pursuant to Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607 and 9613(g), for declaratory relief and reimbursement of costs incurred and to be incurred by the United States in response to releases and threatened releases of hazardous substances into the environment from the Lee's Lane Landfill Superfund Site located approximately 4.4 miles southwest of Louisville, Kentucky, adjacent to the eastern bank of the Ohio River (the "Site");

WHEREAS, the costs the United States has incurred in performing response actions at the Site are \$4,017,165.43 and the interest on the outstanding balance is \$1,361,580.76, for a total of \$5,378,746.19 ("Past Costs") plus additional attorney's fees, interest and other expenses incurred through the date of entry of this Consent Decree and costs incurred in connection with this

Consent Decree until termination of this Consent Decree (collectively, "Future Costs").

WHEREAS, the United States has already entered into settlements with other parties in connection with the Site and pursuant to the settlements, embodied in two consent decrees, the other parties have reimbursed the United States a total of \$3,101,230.00 for Past Costs incurred by the United States;

WHEREAS, pursuant to an Administrative Order on Consent, the Jefferson County [Municipal Authority] has provided \$500,000 in maintenance and oversight costs for the Site;

WHEREAS, the United States has sought to recover Past Costs of \$2,277,516.19 and obtain a declaratory judgment for Future Costs from the remaining nonsettling defendants: Ben B. Hardy, J H Realty, Inc. and The Hofgesang Foundation, Inc. ("Foundation") (hereinafter collectively "Defendants");

WHEREAS, the United States and Defendants agree and this Court, by entering this Consent Decree, finds that settlement of this matter will avoid prolonged and complicated litigation and that this Consent Decree, without being an admission of liability, is fair, reasonable, and in the public interest;

THEREFORE, with the consent of the parties to this Consent Decree, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

A. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction

over Defendants. Solely for the purposes of this Consent Decree, Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

II. REPRESENTATIONS AND WARRANTIES

B. Defendants represent and warrant to the best of their knowledge and belief as follows [subject to discovery prior to lodging]:

1. The Foundation has assets as follows [more specific information to be provided]:

a. An account receivable in the form of a note in the original amount of \$285,000 payable in 60 monthly installments (forty monthly payments of \$3,000.00 each remain on the note and a balloon payment of \$208,037.81 is due at the end of forty months);

b. Real estate at 3000 Crittenden Drive, Louisville, Kentucky, which was appraised at \$585,000 on April 13, 1993, and which has an outstanding mortgage of \$131,480.51 as of April 3, 1995;

c. A note in the original amount of \$7,000.00, payable in 40 monthly installments, secured by a single family residence located at 2206 Greenwood Avenue, Louisville, Kentucky, value unknown;

d. Numerous undeveloped lots near the Lee's Lane Landfill, value unknown;

e. Real estate in Indiana, value unknown, concerning which a trial court in Indiana has entered summary judgment finding that the Foundation has lost title by adverse possession, and with respect to which summary judgment the Foundation has appealed;

f. Real estate in Indiana, value unknown, which is the subject of litigation [currently in the Hofgesang Estate];

g. Checking account with Great Financial Bank, Louisville, Kentucky, with a balance of \$818.23 as of May 19, 1995;

h. Real estate at 2001 S. 41st Street, 2003 S. 41st Street, 2000 S. 40th Street and 1820 S. 40th Street, Louisville, Kentucky which is currently subject to tax liens which exceed the values of the properties;

i. The Central and Northern Tracts of the Lee's Lane Landfill;

j. Stock of J H Realty, Inc.

2. J H Realty, Inc. has as its only asset the Southern Tract of the Lee's Lane Landfill.

3. Ben B. Hardy has liabilities of approximately _____ which exceed his assets of approximately _____.

4. Defendants have made no fraudulent conveyances or transfers in the last seven years.

III. PAYMENTS BY THE DEFENDANTS

C. In full and complete settlement, discharge and satisfaction of any claims and demands against the Defendants by the United States for Past Costs and Future Costs, the Foundation

shall pay to the United States 90% of the net liquidated value of the assets of the Foundation listed in B.1.(a) through (g) of this Consent Decree (the "Settlement Assets") [which excludes the properties subject to the tax liens, the Lee's Lane Landfill Northern and Central Tracts, and the stock of J H Realty, Inc. (owner of the Southern Tract of the Lee's Lane Landfill)] up to \$600,000; and then 85% of the net liquidated value of the Settlement Assets between \$600,000 and \$800,000; and then 80% of the net liquidated value of the Settlement Assets over \$800,000. "Net liquidation value" means any cash amount which is divided between the United States and the Foundation produced from the liquidation of Settlement Assets minus the costs incurred in preserving and liquidating the Settlement Assets. Payment shall be made in accordance with instructions provided by the United States to the Defendants upon entry of the Consent Decree.

IV. LIQUIDATION PROCESS

D. At any time after entry of this Consent Decree, the United States may appoint a receiver or other third party to liquidate the Settlement Assets. The Foundation shall cooperate with the receiver or third party in the liquidation, including but not limited to, providing necessary signatures, information, or documents relating to the Settlement Assets or the liquidation thereof. The Foundation shall grant the receiver or third party a general power of attorney to perform the liquidation on behalf of the Foundation during the period of liquidation. The receiver or

third party shall not assume any responsibility for managing or operating the Lee's Lane Landfill.

E. Unless and until a receiver or third party is appointed, the Foundation shall not take any action, and shall not refuse to take any action, that it believes will adversely affect the value of the Foundation's Settlement Assets, including but not limited to failing to pay taxes, mortgage payments or utility bills, encumbering any real estate, or allowing any rights to lapse in pending litigation. The Foundation may use the Settlement Assets or proceeds from Settlement Assets to preserve the Settlement Assets of the Foundation unless and until a receiver or third party is appointed, including paying management fees, taxes, mortgage payments, and utility bills for the Settlement Assets and any necessary and reasonable attorney's fees to protect any rights relating to the Settlement Assets which are or become the subject of litigation.

F. If a receiver or third party is appointed, the United States shall have a reasonable time to complete the liquidation of the Settlement Assets. During the time of the liquidation, the receiver or other third party shall have the authority to preserve the Settlement Assets, including, but not limited to, paying management fees, necessary and reasonable attorney's fees, mortgage payments, utility bills and taxes.

G. Unless and until the United States appoints a receiver or other third party to liquidate the Settlement Assets, the Foundation, with the written consent of the United States through

its undersigned attorneys, shall use best efforts to liquidate the Settlement Assets of the Foundation according to the attached schedule [to be provided by Defendants]. The Foundation shall be compensated out of Foundation Settlement Assets for the reasonable and necessary costs and expenses of such liquidation. All liquidation costs and expenses that have been preapproved in writing shall be reimbursable from the liquidation proceeds. If any such costs and expenses have not been preapproved, and the parties dispute the reasonableness or necessity of the costs or expenses, the dispute shall be resolved by the Court.

V. CONTRIBUTION PROTECTION

H. With regard to claims for contribution against Defendants for matters addressed in this Consent Decree, the parties agree that, upon entry of this Consent Decree and conditioned upon the subsequent payments by Defendants of the amounts required by this Consent Decree, Defendants are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), for the matters addressed in this Consent Decree.

VI. MODIFICATION

I. Except as provided for herein, there shall be no modification of this Consent Decree without prior written approval of the parties to this Consent Decree and the Court.

VII. DISMISSAL OF CLAIMS

J. The United States hereby dismisses without prejudice its claims against the Defendants, except for those claims based on Past Costs or Future Costs, as to which claims the dismissal is with prejudice.

VIII. EFFECTIVE DATE

K. Defendants are bound by the terms and conditions of this Consent Decree upon their signature to this Consent Decree. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

IX. CONTINUING JURISDICTION OF THE COURT

L. The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

X. TERMINATION

M. The terms of this Consent Decree shall remain in effect until the Settlement Assets of the Foundation have been liquidated and the appropriate amounts have been distributed to the United States and the Foundation.

THIS CONSENT DECREE is entered on this ____ day of _____, 1995. IT IS SO ORDERED.

UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-072-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

FOR THE UNITED STATES OF AMERICA

DATE

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044

DATE

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JAMES D.P. FARRELL, trial attorney
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OF COUNSEL:

ROBERT CAPLAN
Assistant Regional Counsel
Environmental Protection Agency, Region IV

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Hardy, et al., Nos. 90-0695-L(J) and 90-0792-L(J) relating to the Lee's Lane Landfill Superfund Site in Louisville, Kentucky.

Defendant _____

Date: _____

By: _____

Name: _____

Title: _____

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